Supreme Court, U.S.
FILED
JUN 17 1992
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(2)

No. 91-1867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN M. SPEAR and SPEAR PRINTING CO., INC.,

Petitioners,

vs.

TOWN OF WEST HARTFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that the Petitioners' first amendment claim failed because the Petitioners' allegations of constitutional deprivation were too conclusory and speculative to constitute a claim under 42 U.S.C. § 1983?

2. Did the court of appeals err in holding that liability under 42 U.S.C. § 1983 may not be predicated on a claim of malicious abuse of process?

3. Did the court of appeals err in holding that the Town of West Hartford's actions did not so "shock the conscience" as to violate the Petitioners' rights to due process of law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
I. STATEMENT OF THE CASE	1
A. PROCEDURAL HISTORY	1
B. STATEMENT OF FACTS	2
II. REASONS WHY THE PETITIONERS' WRIT SHOULD BE DENIED	7
A. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT THE PETITIONERS' FIRST AMENDMENT CLAIM FAILED BECAUSE THE PETITIONERS' ALLEGATIONS OF CONSTITUTIONAL DEPRIVATION WERE TOO CONCLUSORY AND SPECULATIVE TO SUPPORT A CAUSE OF ACTION UNDER SECTION 1983	7
B. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT LIABILITY UNDER SECTION 1983 MAY NOT BE PREDICATED ON A CLAIM OF MALICIOUS ABUSE OF PROCESS	9
C. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT WEST HARTFORD'S ACTIONS DID NOT SO "SHOCK THE CONSCIENCE" AS TO VIOLATE THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW	11
III. CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
AGI-Bluff Manor, Inc. v. Reagen, 713 F. Supp. 1535 (W.D. Mo. 1989)	12
Andree v. Ashland County, 818 F.2d 1306 (7th Cir. 1987)	10
Baker v. McCollan, 443 U.S. 137 (1979)	11, 12
Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187 (5th Cir. 1978)	10
Carey v. Piphus, 435 U.S. 247 (1978)	9
Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1987)	10
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)	9
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	8
Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975)	9
Gordon v. Warren Consolidated Bd. of Educ., 706 F.2d 778 (6th Cir. 1983)	8
Havas v. Thornton, 609 F.2d 372 (9th Cir. 1979)	9
Howard Gault Co. v. Texas Rural Legal Aid, Inc., 615 F. Supp. 916 (D. Tex. 1985), *aff'd*, 848 F.2d 544 (5th Cir. 1988)	10, 11
Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544 (5th Cir. 1988)	10, 11

Page

Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied sub nom. Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973) 12

Laird v. Tatum, 408 U.S. 1, *reh'g denied*, 409 U.S. 901 (1972) 8

McMaster v. Cabinet for Human Resources, 824 F.2d 518 (6th Cir. 1987) 10

Rochin v. California, 342 U.S. 165 (1952) 12

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 8

Snyder v. Massachusetts, 291 U.S. 97 (1934) 12

Spear v. Town of West Hartford, 954 F.2d 63 (2d Cir. 1992) 2, 6

Spear v. Town of West Hartford, 771 F. Supp. 521 (D. Conn. 1991), *aff'd*, 954 F.2d 63 (2d Cir. 1992) 2, 5

Tarkowski v. County of Lake, 775 F.2d 173 (7th Cir. 1985) 10

Town of West Hartford v. Operation Rescue, 726 F. Supp. 371 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990) 2, 7

United Presbyterian Church In The U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) 8

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 8

Page

Wade v. Goodwin, 843 F.2d 1150 (8th Cir.), *cert. denied*, 488 U.S. 854 (1988) 8

Warth v. Seldin, 422 U.S. 490 (1975) 8

White v. Frank, 855 F.2d 956 (2d Cir. 1988) 9

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. III 8

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. IV 10

U.S. Const. amend. XIV ..... *passim*

STATUTES:

18 U.S.C. § 1961 3

42 U.S.C. § 1983 ..... *passim*

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On August 22, 1990, the Petitioners, John M. Spear and Spear Printing Co., Inc., brought suit under 42 U.S.C. § 1983 in the United States District Court for the District of Connecticut against the Respondent, the Town of West Hartford, Connecticut, as well as West Hartford's Corporation Counsel, Marjorie S. Wilder, and West Hartford's Acting Town Manager, Robert R. McCue. The Petitioners also sued the Summit Women's Center

West, Inc, ("Summit"), a private corporation located in West Hartford.

Motions to dismiss the Petitioners' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure were filed by all of the defendants, and were granted by the District Court in an opinion dated April 17, 1991. Judgment was entered for the defendants on April 18, 1991. *Spear v. Town of West Hartford*, 771 F. Supp. 521 (D. Conn. 1991).

The Petitioners appealed from that judgment to the United States Court of Appeals for the Second Circuit. On January 13, 1992, the Second Circuit affirmed, in its entirety, the District Court's dismissal of the Petitioners' action. On February 21, 1992, the Second Circuit denied the Petitioners' petition for rehearing *en banc*. *Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992).

The Petitioners have now petitioned this Court for a writ of certiorari, but only as to West Hartford.

B. STATEMENT OF FACTS

The Petitioners alleged the following facts in their complaint: John M. Spear is the editor of the *Orange County Post*, a weekly newspaper published in Washingtonville, New York, by the Spear Printing Company, Inc. On April 4, 1989, Spear wrote and published an editorial entitled "Northern Rednecks" in which he sharply criticized the actions of the West Hartford Police Department in attempting to disband an anti-abortion demonstration which took place in front of the Summit Women's Center in West Hartford, Connecticut on April 1, 1989. Complaint ¶¶ 5-6, 14-15 (Petitioners' Appendix ("Pet. App.") at 29a-30a, 32a).

On June 29, 1989, West Hartford filed a civil action in the United States District Court for the District of Connecticut seeking damages and seeking to prevent the demonstrators from interfering with the operations of the Summit Women's Center. *See Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989).

West Hartford's complaint named eighteen defendants, including the Petitioners. In particular, West Hartford sought injunctive relief and asserted causes of action pursuant to Civil RICO, 18 U.S.C. § 1961 *et seq.*, and state tort law. West Hartford also alleged a conspiracy to interfere with civil rights. Complaint ¶ 23 (Pet. App. at 33a-34a). In regard to the Petitioners, West Hartford's complaint alleged:

> On or about Tuesday, April 4, 1989, the defendant Spear Printing Co., Inc., through its editor, the defendant John M. Spear, deliberately and maliciously published an incorrect, defamatory account of the April 1, 1989 protest based upon reports given to him by the defendant Catherine A. Jersey, another employee of the defendant Spear Printing Co., Inc., who was one of the protesters arrested by West Hartford police on April 1, 1989 at the Summit Women's Center, in furtherance of the efforts of the defendants and others to harass, intimidate and extort a less diligent or softened response from the West Hartford Police Department to future protest activities by the defendants and others at the Summit Women's Center and elsewhere within the Town of West Hartford.

Complaint ¶ 26 (Pet. App. at 34a-35a)

On September 22, 1989, Summit Women's Center filed an intervenor complaint, also naming the Petitioners. On December 6, 1989, West Hartford and Summit filed a joint amended complaint from which the Petitioners were dropped as parties. Complaint ¶ 48, 57 (Pet. App. at 39a, 40a-41a).

On August 22, 1990, the Petitioners instituted the present action against the Town of West Hartford, Corporation Counsel Wilder, Acting Town Manager McCue and the Summit Women's Center. The Petitioners alleged that their entire action was in response to the "initiation by Defendants of unconstitutional malicious, egregious and baseless wrongful civil proceedings." Complaint ¶ 1 (Pet. App. at 28a).

In particular, the Petitioners alleged that West Hartford's initiation of civil proceedings against them violated the first and fourteenth amendments to the United States Constitution and constituted vexatious litigation, libel and defamation. Complaint ¶ 58-60, 69, 73 (Pet. App. at 41a, 42a-43a). The Petitioners alleged in Paragraph 58 that:

> The said lawsuits instituted by the Town of West Hartford and the Summit Women's Center West, Inc. caused John M. Spear fear, mental anguish and worry over any potential legal liability particularly in view of the allegations of criminal acts, criminal extortion and criminal racketeering conspiracy, thereby causing a chilling effect upon his First Amendment rights of the press and speech.

(Pet. App. at 41a). In Paragraph 62, the Petitioners alleged:

> The said two lawsuits and the subsequent litigation have damaged John M. Spear and Spear Printing Co., Inc. in that they have been deprived of their rights of speech and of the press by the chilling effect of the said RICO and Hobbs Act lawsuits and particularly by their allegations of extortion, crimes and criminal racketeering conspiracy.

(Pet. App. at 41a). In Paragraph 59, the Petitioners alleged:

> The said action of the Defendants are [sic] so egregious in nature that they shock the conscience, depriving John M. Spear and Spear Printing Company, Inc. of their rights to the due process of law under the Fourteenth Amendment of the United States Constitution.

(Pet. App. at 41a).

Conspicuously absent from the Petitioners' twenty page complaint, however, were any allegations of fact which might have led one to conclude that any constitutional rights of the Petitioners, either collectively or singularly, were taken away, infringed upon or violated in any manner.

On April 17, 1991, the District Court granted the defendants' Motions to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Spear v. Town of West Hartford*, 771 F. Supp. 521 (D. Conn. 1991) (Pet. App. at 12a-25a). Specifically, the District Court held that both Corporation Counsel Wilder and Acting Town Manager McCue were absolutely immune from suit based upon their initiation of civil proceedings against the Petitioners. (Pet. App. at 15a-18a).

The District Court also held that the Petitioners failed to state a cause of action under 42 U.S.C. § 1983 against West Hartford for deprivation of their first amendment rights. In particular, the District Court stated that the Petitioners failed "to make allegations that indicate[d] a deprivation of constitutional rights," as the "chilling effect alleged by the [Petitioners was] speculative, indirect and remote." (Pet. App. at 18a-20a).

In addition, the District Court held that the Petitioners failed to state a claim under section 1983 based on a violation of substantive due process and malicious prosecution. The District Court stated that "the defendants' initiation of suit against the [Petitioners] and the meeting between the Town's attorneys, the attorneys for Summit and Leisa Montgomery, a Summit administrator, do not constitute conduct so egregious as to 'shock the conscience.' " (Pet. App. at 20a-21a).

The District Court also stated that the Petitioners failed to state a section 1983 claim predicated on malicious prosecution, because malicious prosecution can only support a section 1983 action if it is based upon the malicious initiation of a *criminal* prosecution. The District Court correctly noted that the initiation of *civil* proceedings cannot support a section 1983 action for malicious prosecution. (Pet. App. at 21a-22a). Finally, the District Court held that Summit was not a state actor, and therefore was not subject to liability pursuant to section 1983. (Pet. App. at 22a-24a).

The Petitioners then appealed from this judgment to the United States Court of Appeals for the Second Circuit. On January 13, 1992, the Second Circuit affirmed the District

Court's dismissal of the Petitioners' action as to all of the defendants. *Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992) (Pet. App. at 1a-11a).

In particular, the Second Circuit agreed with the District Court that Corporation Counsel Wilder and Acting Town Manager McCue were absolutely immune from suit, and that Summit was not a state actor and thus could not be sued under section 1983. (Pet. App. at 5a-7a, 10a-11a).

The Second Circuit also agreed with the District Court that the Petitioners' allegations of first amendment injury were too conclusory and speculative to constitute a cause of action under section 1983, and thus the Petitioners' "naked assertion of a chill [did] not suffice to defeat a Rule 12(b)(6) motion." (Pet. App. at 7a-9a).

Moreover, the Second Circuit agreed with the District Court that section 1983 liability may not be predicated on a claim for malicious abuse of process. As the Second Circuit noted, "[w]hile section 1983 liability may be predicated on a claim for malicious prosecution . . . it may not be predicated on a claim for malicious abuse of process." (Pet. App. at 9a-10a)

Finally, the Second Circuit agreed with the District Court that West Hartford's actions of meeting with Summit and bringing a civil suit against the Petitioners did not so "shock the conscience" as to violate the Petitioners' rights to due process of law. (Pet. App. at 9a).

II. REASONS WHY THE PETITIONERS' WRIT SHOULD BE DENIED.

A. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT THE PETITIONERS' FIRST AMENDMENT CLAIM FAILED BECAUSE THE PETITIONERS' ALLEGATIONS OF CONSTITUTIONAL DEPRIVATION WERE TOO CONCLUSORY AND SPECULATIVE TO SUPPORT A CAUSE OF ACTION UNDER SECTION 1983.

The Petitioners claim that the Second Circuit erred in holding that their allegations of first amendment injury were too conclusory and speculative to support a cause of action under section 1983. The Second Circuit's holding, however, was well-supported by established constitutional doctrine and squarely in accord with prior decisions of this Court.

The Petitioners claim that simply by filing its lawsuit, West Hartford chilled their first amendment rights.[1] Despite their repeated allegations of a "chilling effect" and their claim of "fear, mental anguish and worry," the Petitioners' complaint simply gave no indication of how the Petitioners were inhibited from the exercise of their constitutional rights. In the words of the Second Circuit, "Spear's naked assertion of a chill does not suffice to defeat a Rule 12(b)(6) motion." (Pet. App. at 8a).

The Second Circuit did not hold, as the Petitioners claim, that a section 1983 plaintiff must allege "subsequent injury" to free speech. Rather, the Second Circuit held merely that a plaintiff's allegations of constitutional injury must be sufficiently specific to show that they are not merely conclusory, remote or speculative. Faced with nothing more than the Petitioners'

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[1] The Petitioners appear to have dropped their claim that the temporary restraining order issued by the District Court in *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990), which explicitly exempted first amendment activities, chilled their freedom of expression. This argument was rejected by both the District Court and the Second Circuit. (Pet. App. at 8a-9a, 19a-20a).

repeated incantation of the words "chilling effect," the Second Circuit had no choice but to uphold the dismissal. Indeed, it is hard to imagine an allegation more conclusory, speculative, and more of a "naked assertion." (Pet. App. at 7a-9a).

In *Laird v. Tatum*, 408 U.S. 1, *reh'g denied*, 409 U.S. 901 (1972), this Court recognized that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of *specific present objective harm or a threat of specific future harm* . . . ." 408 U.S. at 13-14 (emphasis added). Nor can the Petitioners' perfunctory allegations of mental anguish suffice to establish the "tangible consequences" required by *Laird*. *Gordon v. Warren Consolidated Bd. of Educ.*, 706 F.2d 778, 780 (6th Cir. 1983). "Subjective fear. . . is insufficient to establish a [f]irst [a]mendment claim." *Id.* at 781 (citation omitted). *See also Wade v. Goodwin*, 843 F.2d 1150, 1152 (8th Cir.), *cert. denied*, 488 U.S. 854 (1988) ("[S]peculative apprehensiveness as to future misuse of information resulting in direct harm" is subjective chill only); *United Presbyterian Church In The U.S.A. v. Reagan*, 738 F.2d 1375, 1378-80 (D.C. Cir. 1984) (Fear of illegal surveillance does not constitute cognizable harm under first amendment and therefore is not remediable).

Laird makes clear that if a court were to permit allegations of "subjective chill" to constitute a cognizable claim, then the court would eventually be forced to render an advisory opinion in contravention of Article III of the United States Constitution. 408 U.S. at 14. Without specific allegations indicating a constitutional deprivation, the Petitioners' section 1983 complaint failed to state a justiciable controversy under Article III. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (*quoting Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). *See also Warth v. Seldin*, 422 U.S. 490, 501 (1975) (Injury or threat must be "distinct and palpable"); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974) (Injury or threat must be "concrete").

The cases relied upon by the Petitioners simply do not address the issue of whether a section 1983 complaint has been pleaded with sufficient specificity. Moreover, each case involves a plaintiff who suffered specific, demonstrable harm. *See Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (Plaintiff lost her job in retaliation for her expression of opinion); *Carey v. Piphus*, 435 U.S. 247 (1978) (Students suspended from school without due process); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975) (Plaintiff's protest sign seized and destroyed).

Because the Second Circuit's holding was firmly based on established constitutional law, this Court should not grant certiorari on this ground.

B. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT LIABILITY UNDER SECTION 1983 MAY NOT BE PREDICATED ON A CLAIM OF MALICIOUS ABUSE OF PROCESS.

The Petitioners claim that the Second Circuit erred in holding that liability under section 1983 may not be predicated on a claim of malicious abuse of process, as opposed to malicious prosecution. Yet, despite their assertion that there is a split among the circuits on this issue, the Petitioners fail to cite a single case holding that malicious abuse of process – vexatious initiation of *civil* litigation – may serve as the basis of a section 1983 claim.

Because "Spear was subject only to civil, not criminal liability," the Second Circuit held:

> any abuse would have been malicious abuse of process rather than malicious prosecution. While section 1983 liability may be predicated on a claim for malicious prosecution, *e.g.*, *White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988), it may not be predicated on a claim for malicious abuse of process. *E.g.*, *Havas v. Thornton*, 609 F.2d 372, 376 (9th Cir. 1979).

(Pet. App. at 9a-10a).

Nor is this holding a "novel" departure from established case law, as the Petitioners claim. Indeed, "courts that have recognized that malicious prosecution may support a section 1983 claim are virtually unanimous in holding that constitutional protection exists only with respect to criminal proceedings and not to civil proceedings." *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987). *See Coogan v. City of Wixom*, 820 F.2d 170, 174-75 (6th Cir. 1987).

No case cited by the Petitioners holds otherwise. The Petitioners cite *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978), yet this case held that the plaintiff's claim of misuse of civil legal procedure could *not* be remedied under section 1983. *Id.* at 1189. The Petitioners also rely on *Tarkowski v. County of Lake*, 775 F.2d 173 (7th Cir. 1985); in that case, however, the court explicitly refrained from ruling on whether malicious abuse of process is actionable under section 1983, and held only that the litigation in question was not baseless. *Id.* at 174-75. In *Andree v. Ashland County*, 818 F.2d 1306 (7th Cir. 1987), also cited by the Petitioners, the court refused to provide a remedy under section 1983, holding that "the mere unsuccessful attempt to secure an injunction under an allegedly unconstitutional ordinance does not itself make out a deprivation of constitutional rights." *Id.* at 1312.

Finally, the Petitioners' reliance on *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1988) is equally misplaced. In fact, the trial court's ruling in *Howard Gault*, left intact after appeal, was that "[t]o the extent that [the claimant's] malicious prosecution claim is cognizable under §1983, [. . .], *he cannot prevail because the state court proceeding was civil, not criminal.*" 615 F. Supp. 916, 938 (D. Tex. 1985) (emphasis added). The application of section 1983 to malicious prosecution claims, the district court held, rests "on the protections afforded criminal defendants by the Fourth and Fourteenth Amendments, protections that do not extend to defendants in civil suits even if the civil action is brought by persons acting under color of state law." 615 F. Supp. at 938 (citing *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978)).

The district court in *Howard Gault* did provide relief to the claimant under section 1983, but *not* on the claim of malicious prosecution. Rather, the claimant was awarded $500 on the separate claim that his first amendment rights were violated by the issuance of an unconstitutional temporary restraining order. The district court distinguished between the issuance of the unconstitutional TRO, which provided the basis for a section 1983 claim, and the claim of malicious prosecution of civil litigation, which did not. 615 F. Supp. at 938. The district court's ruling on the TRO was upheld by the Fifth Circuit, in the opinion cited by the petitioner. 848 F.2d 544. The district court's ruling on the malicious prosecution claim, however, was apparently not even raised on appeal, and was not addressed by the circuit court.

The Petitioners have failed to cite a single circuit, or even a single case, holding that section 1983 liability may be predicated on a claim of malicious abuse of process. It is well-established in federal constitutional case law that only malicious prosecution—involving criminal, not civil, litigation—may serve as the basis of a section 1983 claim. Thus, this Court should not grant certiorari on this ground.

C. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT WEST HARTFORD'S ACTIONS DID NOT SO "SHOCK THE CONSCIENCE" AS TO VIOLATE THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW.

The Petitioners claim that the Second Circuit erred in holding that West Hartford's actions did not so "shock the conscience" as to violate the Petitioners' fourteenth amendment rights to due process. It is abundantly clear, however, that West Hartford's conduct did not even remotely approach the "shock the conscience" standard.

"A substantive due process claim does not require that a specific constitutional guarantee be violated; but it does require that the actions alleged be such as to 'shock the conscience,' offend the 'concept of ordered liberty,' or suggest 'outrageousness.' *Baker v. McCollan*, 443 U.S. 137, 147 [. . .] (1979) (Blackmun,

J., concurring). Unless the alleged conduct is so egregious as to violate 'a principle of justice so rooted in the conditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Massachusetts*, 291 U.S. 97, 105 [. . .] (1934), it does not violate substantive due process and will not support a claim cognizable under §1983. *See Baker v. McCollan*, 443 U.S. at 146-47 [. . .]." *AGI-Bluff Manor, Inc. v. Reagen*, 713 F. Supp. 1535, 1544 (W.D. Mo. 1989).

Conduct that has been found to "shock the conscience" generally has been maliciously and sadistically aimed at prisoners or detainees for the purpose of causing fear or harm. *See, e.g., Johnson v. Glick*, 481 F.2d 1028, 1029-33 (2d Cir.), *cert. denied sub nom. Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973) (corrections officer struck and threatened to kill pretrial detainee). *Rochin v. California*, 342 U.S. 165 (1952), illustrates the application of this high threshold for substantive due process claims. In *Rochin*, a criminal suspect placed some capsules in his mouth during arrest. Police officers took him to a hospital where the suspect was forced against his will to take an emetic which caused him to vomit the capsules, which were then found to contain narcotics. *Id.* at 166. This Court denounced the conduct of "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, and the forcible extraction of his stomach's contents. . ." as shocking to the conscience. *Id.* at 172.

The outrageous actions of law enforcement personnel in the aforementioned cases stand in sharp contrast to the events that constitute the basis of the instant action. As the Second Circuit correctly held, "[t]he district court reasonably concluded that West Hartford's actions in meeting with Summit and suing Spear fell short of [the 'shock the conscience'] standard." (Pet. App. at 9a). Thus, this Court should not grant certiorari on this basis.

III. CONCLUSION

For the several reasons already stated, the Petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

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